STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
(Griffin, P.J. and Meter, and Kelly, J.J.)

SHARDA GARG,

Plaintiff-Appellee and
Cross-Appellant,

v

MACOMB COUNTY COMMUNITY MENTAL HEALTH SERVICES, a governmental agency of MACOMB COUNTY,

Defendant-Appellant and
Cross-Appellee.
_____/

Supreme Court
No: 121361

Court of Appeals
No: 223829

Macomb County Circuit Court
No: 95-3319 CK

BRIEF ON CROSS APPEAL FOR DEFENDANT MACOMB COUNTY COMMUNITY MENTAL HEALTH SERVICES

*****ORAL ARGUMENT REQUESTED*****

KITCH DRUTCHAS WAGNER
DENARDIS & VALITUTTI

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COUNTER-STATEMENT REGARDING JURISDICTION

This matter is before this Court on leave granted by order of April 15, 2004. MCR 7.301(A). The issues to be briefed include:

(1) Whether plaintiff established a prima facie case regarding either of her two theories of retaliation, (2) whether a new trial is required because one of the theories submitted to the jury was unsupported by the proofs, (3) whether the continuing violations doctrine of Sumner v Goodyear Tire & Rubber Co, 427 Mich 505 (1986), should be preserved, modified, or abrogated in light of the language of the statute of limitations, MCL 600.5805(1), and the United States Supreme Court's decision in Nat'l Rail Passenger Corp v Morgan, 536 US 101 (2002), and (4) whether plaintiff received an award of future damages within the meaning of MCL 600.6013(1), thus barring prejudgment interest on that amount.

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COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I

WHETHER PLAINTIFF SOUGHT, AND RECEIVED AN AWARD OF FUTURE DAMAGES WITHIN THE MEANING OF MCL 600.6013(1), THUS BARRING PREJUDGMENT INTEREST ON THAT AMOUNT?

The Court of Appeals held the answer is "Yes."

The trial court held the answer is "Yes."

Plaintiff asserts the answer is "No."

Defendant Macomb County Community Mental Health Services submits the answer is "Yes."

II

WHETHER PLAINTIFF MAY ASSERT FOR THE FIRST TIME IN HER MERIT BRIEF BEFORE THIS COURT ENTITLEMENT TO INTEREST ON MEDIATION SANCTIONS, AN ISSUE NEVER BEFORE RAISED ON APPEAL AND AS TO WHICH LEAVE TO APPEAL HAS NOT BEEN GRANTED?

The Court of Appeals was not asked to address this issue.

This issue was not addressed by the trial court.

Plaintiff asserts the answer is "Yes."

Defendant Macomb County Community Mental Health Services submits the answer is "No."

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COUNTER-STATEMENT OF FACTS

The underlying facts are set forth in defendant Macomb County Community Mental Health Services' brief as appellant. This counter-statement of facts is set forth as plaintiff's statement of facts is incomplete, and without record or appendix citations to support most of her factual assertions.

This Court by order of April 14, 2004, has granted plaintiff's application for leave to appeal as cross appellant in which plaintiff raised as the sole issue for review: "Should interest on plaintiff's damages begin to run from the date of filing the complaint where those damages are not "future damages" within the meaning of MCLA § 600.6013." (Cross appellee's apx 24b, cross appellant's application, p vi.) This also was the only issue raised by plaintiff in the Court of Appeals (by way of delayed application for leave to cross appeal). Evidence and proceedings relevant to this issue are as follows.

Plaintiff testified at trial on direct examination that, as a result of the alleged discrimination or retaliation, she sustained mental and emotional injuries and physical injuries in the nature of sleeplessness, increased blood pressure, loss of appetite and weight loss (cross appellant's apx 74a-83a, Tr, pp 286-293). Plaintiff testified, for example:

> A: [By plaintiff]: I did become withdrawn. I don't sleep at night. When I think about what happened to me at work, you know, I get headaches. I know my blood pressure has been going up since that time and as of late, in emotional terms, I have become very depressed. [Cross appellant's apx 74a, Tr 4/6/98, p 298.]

Upon further questioning by plaintiff's counsel, plaintiff testified:

> Q: Now, Mrs. Garg, is it your testimony that you testified that you had trouble sleeping and you have had headaches?

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Q: And how about your appetite?

A: My appetite changed altogether.

* * *

The Court: What problems did you have?

> The Witness: Yes. I have lost a lot of weight over the period of two or three years, four years. I am like a rollercoaster all the time.

* * *

Q: And these symptoms that you indicated that you were having, ones that you reflected in your lifestyle and the way you felt physically and the way you slept, was the amount and quality and experience and intensity of these symptoms different than any of these kind of symptoms that you have had at other times in your life?

A: Absolutely.

Q: In what way?

A: I can tell when I am stressed out, and I am depressed, and when I am physically - when something is wrong with my body. I work in the field of being able to identify depression and stress and symptoms related to that versus medical problems. [Cross appellant's apx 81a-82a, Tr, pp 293-294.]

At plaintiff's request (cross appellee's apx 7b-13b, Tr, pp 1250-1256, cross appellant's apx 96a, 8/6/98 opinion, p 2), the jury was instructed in accord with SJI2d 50.02. This advised the jury that plaintiff was seeking, and that the jury could award, damages for "physical pain and suffering" (cross appellee's apx 16b-17b, Tr 4/22/98, pp 129-130). The jury was instructed:

> You should include each of the following elements of the damage which you decide has been sustained by plaintiff to the present time and that would be any physical pain and suffering, mental anguish, denial of social pleasure, and enjoyment, and any embarrassment, humiliation or mortification and the loss of her earning capacity. You should also include each of the following elements of damage which you decide plaintiff is reasonably certain to sustain in the future, and again that would be any physical pain and suffering, mental anguish, denial of social pleasure and

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enjoyment, embarrassment, humiliation and mortification and loss of earning capacity. [Cross appellee's apx 16b-17b, Tr 4/22/98, pp 129-130, emphasis added.]

Defendant had specifically requested that the jury be given a verdict form which would break down future damages. However, plaintiff opposed that request, and the trial court agreed with plaintiff (cross appellee's apx 2b-6b, proposed verdict form, apx 14b-15b, Tr 4/22, pp 11-12, cross appellant's apx 96a, 8/6/98 opinion, p 2). As a result, the jury returned a general verdict assessing plaintiff's "damages at $250,000" (cross appellee's apx, 18b).

Plaintiff subsequently argued that no part of the verdict consisted of damages for personal injury because plaintiff's counsel in closing argument never specifically requested any such damages. Plaintiff argued in the alternative that if the court determined that plaintiff received damages for personal injury, then future wage loss and pension could easily be broken out by the judge for purposes of not awarding prejudgment interest. (Cross appellee's apx 22b, 6/10/98 Brief in Support of Award of Interest, p 4.)

In an opinion and order of August 6, 1998, the trial court held that no interest would be awarded on future damages, pursuant to MCL 600.6013(1), as this was an action in which plaintiff had sought damages for personal injury (cross appellant's apx 97a-98a, 8/6/98 opinion). Thus, at the urging of plaintiff, the trial court in its opinion of August 6, 1998, made an "equitable determination" as to what should be attributed to future damages. The trial court concluded that $15,000 would be attributed to future emotional damages. Noting that "plaintiff suggests in her brief that future wage loss and pension loss be considered as future damages", the trial court concurred and found a

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total sum attributable to future damages to be $141,150. The trial court directed that interest would run on that amount commencing as of the date of the judgment. (Cross appellant's apx 97a-98a, 8/6/98 opinion, p 3.)

On plaintiff's cross appeal of this issue, the Court of Appeals held that the trial court properly concluded that plaintiff had sought "future damages" in that plaintiff had testified she sustained, and sought damages for, "bodily harm, sickness or disease." (Cross appellant's apx, 104a-105a.)

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ARGUMENT

I PLAINTIFF SOUGHT, AND RECEIVED AN AWARD OF FUTURE DAMAGES WITHIN THE MEANING OF MCL 600.6013(1), THUS BARRING PREJUDGMENT INTEREST ON THAT AMOUNT.

Entitlement to interest on a judgment is statutory and must be specifically authorized by statute. Department of Transportation v Schultz, 201 Mich App 605, 610; 506 NW2d 904 (1993). MCL 600.6013(1) provides that interest is allowed in a civil action as provided in that section, but that interest is not allowed on "future damages" from the date of filing of the complaint to the date of entry of the judgment. The question of whether damages sought by plaintiff here fall within this definition is a question of statutory interpretation, reviewed de novo. Roberts v Mecosta Co Gen Hospital, 466 Mich 57, 62; 642 NW2d 663 (2002).

It was clearly plaintiff's burden to establish entitlement to interest on future damages in accordance with MCL 600.6013(1). This, however, plaintiff failed to do.

MCL 600.6013(1) provides:

> (1) Interest shall be allowed on a money judgment recovered in a civil action, as provided in this section. However, for complaints filed on or after October 1, 1986, interest shall not be allowed on future damages from the date of filing the complaint to the date of entry of the judgment. As used in this subsection, "future damages" means that term as defined in Section 6301. [MCL 600.6013.]

MCL 600.6301 defines the term "future damages" as used in MCL 600.6013 as follows:

> As used in this chapter:
>
> (a) "Future damages" means damages arising from personal injury which the trier of fact finds will accrue after the damage findings are made and includes damages for medical treatment, care and custody, loss of earnings, loss of earning capacity, loss of bodily function, and pain and suffering.
>
> (b) "Personal injury" means bodily harm, sickness, disease, death, or emotional harm resulting from bodily harm. [MCL 600.6013.]

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There can be no question that plaintiff here claimed to be suffering from "personal injury," defined as "bodily harm" or "sickness" in MCL 600.6013(1). At the urging of plaintiff's counsel, plaintiff testified on direct examination that she was suffering sickness including headaches, high blood pressure, trouble sleeping, and a loss of appetite as a result of the alleged retaliation/discrimination (cross appellant's apx 74a-83a, Tr, pp 286-293). The jury at plaintiff's own request was explicitly instructed that it should award damages for future "physical pain and suffering." (Cross appellee's apx 16b-17b, Tr 4/22/98, pp 129-130.)

The damages upon which plaintiff affirmatively introduced testimony, and which the jury specifically was instructed to award fell within the plain meaning of "future damages." As the Court of Appeals reasoned in its opinion here:

> A clear and unambiguous statue must be enforced as written. See Sun Valley Food Co v Ward, 460 Mich 230, 236; 596 NW2d 119 (1999) and Adrian School District v Michigan Public School Employees Retirement System, 458 Mich 326, 332; 582 NW2d 767 (1998). The plain language of MCL 600.6301 defines "future damages" as damages resulting from bodily harm, sickness, or disease. The instant plaintiff testified that she suffered from headaches and high blood pressure as a result of the alleged discrimination. This clearly constituted "bodily harm, sickness, or disease." Therefore, the trial court correctly calculated the interest from the date of the judgment on the future damages portion of the award. [Cross appellant's apx 104a.]

Plaintiff's reliance on Paulitch v Detroit Edison Co, 208 Mich App 656; 528 NW2d 200 (1995), lv grtd 451 Mich 899 (1996), vacated and lv den 453 Mich 970 (1996), and Phinney v Perlmutter, 222 Mich App 513; 564 NW2d 532 (1997), is misplaced. In each of these civil rights actions, the Court held that the plaintiff was entitled to prejudgment interest for future damages because the actions there did not result from personal bodily injury. In neither case did the facts reveal that the plaintiff sought or was awarded

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damages for sickness, or for any physical manifestations which clearly constitute personal bodily injury. As the Court of Appeals reasoned here:

> We acknowledge that in Phinney, supra, at 542, 562, and Paulitch v Detroit Edison Co, 208 Mich App 656, 661-663; 528 NW2d 200 (1995), this Court indicated that a plaintiff is entitled to prejudgment interest for future damages when the suit does not result from personal bodily injury. We find these cases sufficiently distinguishable from the instant case, however, because there was no indication in Phinney or Paulitch that the plaintiffs alleged physical manifestations resulting from discriminatory treatment. [Cross appellant's apx, 105a.]

This is a distinction which is critical and which has been recognized in an analogous context of determining whether there exists insurance coverage for civil rights claims. The Michigan Court of Appeals repeatedly has recognized that a civil rights action will in fact involve a claim for "bodily injury" where there is a physical manifestation of the alleged mental suffering. Greenman v Michigan Mutual Ins Co, 173 Mich App 88, 92; 433 NW2d 346 (1988), Ben Franklin Ins Co v Harris, 161 Mich App 86, 89; 409 NW2d 733 (1987). In each of these decisions, the Court held that because the complainant in the underlying action did not allege any physical manifestations of their mental injuries, there was no "bodily injury" as required to trigger coverage under the defendant employer's policy of insurance.

Plaintiff here, by affirmative testimony and instruction to the jury, sought damages for "personal injury"--for "bodily harm, sickness, disease, death, or emotional harm resulting from bodily harm."

Plaintiff's assertion that her damages could not have arisen from "personal injury" because there was no expert medical testimony that her emotional distress was caused by any bodily harm (brief on cross-appeal, p 15), is disingenuous. First, the statute does not limit the definition of personal injury to "emotional distress caused by bodily

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harm." Rather, it broadly includes "bodily harm, [or] sickness . . . or emotional harm resulting from bodily harm." Plaintiff's assertion of her physical manifestations of high blood pressure, loss of appetite and headaches clearly constitute "bodily harm" or "sickness."

Moreover, when objection specifically was made to Mrs. Garg's testimony on these subjects on the ground that she was not a qualified medical expert to so testify, the objection was overruled at the urging of plaintiff's own counsel (cross appellant's apx 82a, Tr 4/6/98, p 294). Finally, plaintiff specifically requested, and the jury was specifically instructed, that plaintiff was seeking and that the jury could award damages "plaintiff is reasonably certain to sustain in the future [including] any physical pain and suffering . . ." (cross appellee's apx 17b, Tr 4/22/98, p 130). It is at best less than candid for plaintiff to assert before this Court that she did not seek or the jury did not award damages for bodily injury.

Plaintiff's argument in her merit brief (pp 12-13) that the trial court erred in attributing particular amounts to future losses because the court was not permitted by MCL 600.6013 to "equitably determine" what portion of the jury 's verdict is amazing. Plaintiff below opposed the special verdict form and breakdown requested by defendant which would have required the jury to make this determination. Plaintiff's affirmative opposition to use of a special verdict form which would have required the jury to delineate among past and future damages in a manner so that it could be determined that any part of plaintiff's damages did not arise from personal injury as defined by the statute clearly precludes plaintiff from complaining before this Court of that omission. See People v Bates, 91 Mich App 506, 516; 238 NW2d 785 (1979) (invited errors

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occasioned by trial counsel's tactics may not be assigned as grounds for reversal). If plaintiff were correct, moreover, the appropriate remedy would be to preclude recovery by plaintiff of any interest on the ground that none of the damages would have been identified as past damages.

Moreover, by virtue of plaintiff's own affirmative objection to the verdict form and failure to ensure that the verdict was returned in a form in which the court could determine and distinguish between categories of damages, Judge Olzark clearly was in fact empowered to make a finding of damages allocation vis-à-vis plaintiff. MCR 2.514(C), specifically provides that "if the court omits from the special verdict form an issue of fact raised by the pleadings or the evidence, a party waives the right to a trial by jury of the issue omitted unless before the jury retires, the party demands its submission to the jury."

In contrast, while plaintiff has waived any complaint to the findings of the jury, defendant did not. The trial court was clearly not empowered to make factual findings with respect to Macomb County Community Mental Health Services, given its right to a jury trial here and its timely objection to the failure to use a verdict form which would have required the jury to make the findings upon which plaintiff must rely for her argument. Although defendant has not elected to raise this as an issue on appeal, in the unlikely event that the Court were to determine that plaintiff was entitled to interest on some portion of her future damages, the Court necessarily would have to remand for a new trial in order to permit the jury to make the findings necessary to such an allocation.

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In summary, plaintiff clearly failed to establish entitlement to interest on future damages. It is plaintiff's burden as the party seeking damages and interest to establish entitlement to the same. Plaintiff testified to and by jury instruction demanded an award of future damages for bodily injury, then opposed a jury verdict which would have provided any breakdown of damages. Plaintiff is not entitled to relief on appeal.

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II PLAINTIFF MAY NOT ASSERT FOR THE FIRST TIME IN HER MERIT BRIEF BEFORE THIS COURT ENTITLEMENT TO INTEREST ON MEDIATION SANCTIONS, AN ISSUE NEVER BEFORE RAISED ON APPEAL AND AS TO WHICH LEAVE TO APPEAL HAS NOT BEEN GRANTED.

Plaintiff's assertion in the second issue and argument in her merit brief that she is entitled to interest on mediation sanctions in addition to that which was awarded by the trial court is not before this Court. MCR 7.302(G)(4) provides that "Unless otherwise ordered by the Court, appeals shall be limited to the issues raised in the application for leave to appeal."

Plaintiff's application for cross appeal raised only one issue: "Should interest on plaintiff's damages begin to run from the date of filing the complaint where those damages are not "future damages" within the meaning of MCLA § 600.6013." (Cross appellee's apx, 24b.) The Court granted leave on only one issue regarding interest: "whether plaintiff received an award of future damages within the meaning of MCL 600.6013(1), thus barring prejudgment interest on that amount." The Court's order granting leave does not "otherwise order" that any additional issues regarding interest be addressed (cross appellant's apx 4a). Therefore plaintiff's assertion that this Court should award additional interest on mediation sanctions is not before the Court.

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RELIEF REQUESTED

WHEREFORE defendant Macomb County Community Mental Health Services respectfully requests that this Honorable Court grant defendant judgment notwithstanding the verdict, a new trial, or affirm the trial court's determination as to interest.

Respectfully submitted,

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DATED: JULY 22, 2004

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IN THE SUPREME COURT

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No: 95-3319 CK

AFFIDAVIT OF SERVICE

STATE OF MICHIGAN)
)SS
COUNTY OF WAYNE)

LYNN A. LASHER, being first duly sworn, deposes and says that she is employed by the law firm of KITCH DRUTCHAS WAGNER DENARDIS & VALITUTTI, and that on the 22ND day of JULY, 2004, she did serve upon:

MONICA FARRIS LINKNER (P28147)
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the following documents:

BRIEF ON CROSS APPEAL FOR DEFENDANT MACOMB COUNTY COMMUNITY MENTAL HEALTH SERVICES

APPENDIX

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AFFIDAVIT OF SERVICE

by having same enclosed in an envelope with postage thereon fully prepaid and deposited in a United States postal receptacle.

Further affiant saith not.

LYNN A. LASHER

Subscribed and sworn to before me
this 22ND day of JULY, 2004

NOTARY PUBLIC, _____ COUNTY, MI
MY COMMISSION EXPIRES:_____

CAROLYN PADALINO
NOTARY PUBLIC, Macomb County, MI
Acting in the County of Oakland, MI
My Commission Expires 4/6/07

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